



FIRE

Foundation for Individual
Rights and Expression

June 28, 2023

Jeff Ettinger
202 Morrill Hall
University of Minnesota
100 Church Street S.E.
Minneapolis, Minnesota 55455

URGENT

Sent via Next Day Delivery and Electronic Mail (ettin026@umn.edu)

Dear Interim President Ettinger:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is troubled by civility requirements reportedly imposed on Professor Karen Painter following a series of emails she sent criticizing the College of Liberal Arts and its leadership.² While the University of Minnesota may require faculty to follow certain, viewpoint-neutral regulations, UMN is now impermissibly restricting the tone, content, frequency, and recipients of Painter's emails. To comply with its constitutional obligations, UMN must rescind these overbroad directives.

On March 1, John Coleman, Dean of the College of Liberal Arts, sent Painter a "Letter of Expectation" expressing concern with Painter's methods of sharing her thoughts about the college and its policies via email.³ Coleman complained Painter was:⁴

(1) sending an unreasonable number of emails, many lengthy, to colleagues, (2) copying numerous uninvolved parties on lengthy emails, (3) attempting to engage higher-level faculty and administrators when an email response or the timeliness of the response is not to your liking, and (4) sending emails that contain

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² The recitation of events here reflects our understanding of the pertinent facts, which is based on publicly available information. We appreciate that you may have additional information to offer and invite you to share it with us.

³ John Coleman, *Letter of Expectation* (March 1, 2023) (on file with author).

⁴ *Id.*

false, mischaracterizing, or intimidating statements, as the tone and tenor of your communications can be accusatory while lacking factual support.

Coleman alleged colleagues avoided confronting Painter out of “fear for retaliation” or further messages in which she might “escalate the language, impugn their character or motives, bring new and unnecessary recipients into the thread, or revisit incidents or allegations that may have already been adjudicated.”⁵ Coleman listed expectations for Painter, including:⁶

- Communicate professionally with others, considering how your language might discourage others from engaging with you.
- Recognize the implicit power dynamics when communicating with staff.
- Reduce the number of, and ideally the length, of emails you send to colleagues, respecting that they have numerous priorities that require their time and attention.
- Reduce the number of emails you send to the Director.
- Refrain from making false or mischaracterizing statements that may damage your working relationships with others.
- Refrain from copying individuals on communications when they do not need to provide a response or they do not need to be apprised of a particular situation or update.

Coleman said failure to follow these rules would subject Painter to disciplinary action.⁷

Then on June 22, Coleman sent Painter a formal written reprimand for “sustained unprofessional conduct and failure to follow the directives in the Letter of Expectation,” alleging Painter violated most of the expectations.⁸ Coleman said Painter made false and mischaracterizing statements in emails where she wrote about: the treatment of non-white faculty, staff, and students; the availability of a course about black music; cronyism between university personnel investigating a complaint she filed against the college; speculation about a university employee’s career trajectory; and her own lawsuit and Equal Opportunity and Affirmative Action complaint against the university.⁹

Coleman further said Painter engaged in unprofessional conduct in emails criticizing the promotion and review process, and also accused Painter of failing to refrain from emailing

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ John Coleman, *Letter of Reprimand* (June 22, 2023) (on file with author).

⁹ *Id.*

individuals who, in his opinion, did not need to respond or know about a particular situation because she sent emails describing problems a student experienced while traveling.¹⁰ Coleman also alleged Painter behaved unprofessionally by both failing to recognize inter-staff power dynamics by involving staff in her disagreements with other colleagues and by asking colleagues to change the language in their emails to those tasked with reviewing Painter for promotion.¹¹ The reprimand said if Painter continues to fail to follow the expectations set out by the March 1 letter, she would be subject to disciplinary proceedings,¹² and Coleman has requested to meet with Painter today to discuss the reprimand.¹³

Any meeting Painter attends and/or any enforcement of the Letter of Expectation must confront the fact that it is constitutionally problematic insofar as some of its directives prohibit protected expression and impose civility requirements on Painter in violation of the university's First Amendment obligations.¹⁴ This is especially so given that the Supreme Court has made clear that protecting freedom of speech and academic freedom at universities and colleges is of particular importance.¹⁵ That means the decisions and actions of public universities like UMN—including the pursuit of disciplinary sanctions¹⁶ and maintenance of policies implicating faculty expression¹⁷—must comport with the First Amendment.

As a threshold matter, the Letter of Expectation is unconstitutionally vague because the language “fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes”¹⁸ and “invites arbitrary and discriminatory enforcement.”¹⁹ Take, for example, the directive that Painter “[r]efrain from making . . . mischaracterizing statements that may damage [her] working relationship with others,” which could conceivably punish speech others simply find subjectively disagreeable. The directive instructing Painter to “[c]ommunicate professionally with others, considering how [her] language might discourage others from engaging with [her],” is similarly problematic, as it fails to define what constitutes unprofessional speech, leaving university administrators nearly limitless discretion to subject a wide range of Painter's expression to punishment on the basis that it is subjectively off-putting or offensive to others.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Healy v. James*, 408 U.S. 169, 180 (1972).

¹⁵ In *Keyishian v. Board of Regents*, for example, the Supreme Court remarked that the university setting is “peculiarly the marketplace of ideas,” and that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.” 385 U.S. 589, 603 (1967); see also *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

¹⁶ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹⁷ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

¹⁸ *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

¹⁹ *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (9th Cir. 1984).

The Supreme Court has repeatedly, consistently, and clearly held government actors may not restrict expression merely because some or even many find it offensive or disrespectful.²⁰ Even where speech is insulting²¹ or outrageous,²² that alone cannot remove it from the protection of the First Amendment.²³ Any conception of free expression must allow room for speech others subjectively feel is “unprofessional” or “uncivil”—particularly on a college or university campus where the need for free and unfettered discussion is at its zenith.²⁴

Public universities like UMN, which are bound to respect employees’ expressive rights by law and through their own institutional policies,²⁵ differ considerably from private workplaces, where at-will employees have few, if any, promises or expectations their employer values freedom of expression. Instead, “conflict is not unknown in the university setting given the inherent autonomy of tenured professors and the academic freedom they enjoy.”²⁶ University employees thus “may have to withstand colleagues that do not like them, are rude, and may be generally disagreeable,” as the law does not “mandate that certain individuals work on their interpersonal skills and cease in engaging in inter-departmental personality conflicts.”²⁷ As the U.S. Court of Appeals for the Ninth Circuit explained, “desire to maintain a sedate academic environment does not justify limitations on a teacher’s freedom to express himself” even if “in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms.”²⁸

²⁰ For example, in holding that burning the American flag was expression protected by the First Amendment, the Supreme Court urged that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

²¹ See, e.g., *Sagan v. Apple Computer*, 874 F.Supp. 1072, 1075 (C.D. Cal. 1994) (poking fun at Carl Sagan by calling him a “Butt-Head Astronomer” was protected speech).

²² *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 54 (1988) (holding parody ad depicting a minister in a “drunken incestuous rendezvous with his mother in an outhouse” was protected speech, and noting that the “political cartoon is a weapon of attack, of scorn and ridicule and satire . . . as welcome as a bee sting”).

²³ There is also no evidence Painter violated any other UMN policy, such as the university’s prohibition on hostile environment harassment, which requires a showing of substantially more than incivility or unprofessionalism. University policy defines “discriminatory harassment,” in relevant part, as unwelcome conduct based on a protected characteristic that is “severe, persistent, or pervasive and: (1) unreasonably interferes with an individual’s employment, education, or participation in a University program or activity; (2) creates a work, employment, or other University environment that a reasonable person would find to be intimidating, hostile, or offensive; or (3) effectively denies an individual equal access to a University program or activity (hostile environment discriminatory harassment).” *Discrimination*, UNIV. OF MINN., <https://policy.umn.edu/hr/discrimination#:~:text=All%20University%20members%20are%20prohibited,in%20the%20Definitions%20section%20below> [<https://perma.cc/H7CZ-Z347>].

²⁴ See *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (holding that a public university violated the First Amendment when it launched an investigation into a faculty member’s offensive writings on race and intelligence, which administrators stated “ha[d] no place at [the college]” and constituted “conduct unbecoming of a member of the faculty.”); see also *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1018-20 (N.D. Cal. 2007) (ordering university to stop enforcing a policy requiring students to “be civil to one another” because it was overbroad and infringed on their expressive rights).

²⁵ *Academic Freedom, Responsibility, Integrity, and Cooperation*, UNIV. OF MINN., <https://provost.umn.edu/about-evpp/academic-freedom> [<https://perma.cc/299T-33ND>].

²⁶ *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003).

²⁷ *Somoza v. University of Denver*, 513 F.3d 1206, 1218 (10th Cir. 2008).

²⁸ *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2009).

While UMN may mandate that all faculty follow neutrally applied communication or email policies, it cannot broadly censor faculty like Painter when others dislike or are inconvenienced by what the speaker has to say. Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business Wednesday, June 28, 2022, confirming that UMN will reverse any discipline imposed on Painter arising from her protected speech.

Sincerely,



Anne Marie Tamburro
Program Officer, Campus Rights Advocacy

Cc: John Coleman, Dean, College of Liberal Arts
Rachel Croson, Executive Vice President and Provost
Brian Steeves, Executive Director and Corporate Secretary, Board of Regents
Orbe Walther, Executive Assistant and Confidential Aide, Office of the President
Ann Waltner, Interim Dean, College of Liberal Arts

Encl.